

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BEND CABLE COMMUNICATIONS, LLC

Employer

and

Case 36-RC-6191

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds²:

SUMMARY

The Employer is engaged in the business of providing cable television and high-speed Internet services from its facility in Bend, Oregon ("Facility"). On February 10, 2003³, the Petitioner filed the instant petition seeking a unit of all full-time and regular part-time employees in the Technical Operations, Customer Service, and Instanet Departments at the Facility, excluding all solely commissioned employees, guards, confidential employees, and supervisors as defined by the Act. The Employer contends that Help Desk Lead Cindy Hovey, Construction Lead Tom Arnold, and Web Developer Kathy Boynton are supervisors as that term is defined by Section 2(11) of the Act and, therefore, should be excluded from the Unit of employees sought by Petitioner. The Petitioner contends that Hovey, Arnold and Boynton are not supervisors and are properly included in the unit.⁴

¹ Briefs were timely received from the parties and were duly considered.

² The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein; the labor organization, herein involved, claims to represent certain employees of the Employer; and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

³ The Petitioner amended the petition on March 13, 2003.

⁴ During the representation hearing in this matter on March 18 and 19, 2003, the Petitioner contended that Jeff Browning is an employee, while the Employer contended he is a statutory supervisor. However, in its brief, the Petitioner conceded Browning's supervisory status under Section 2(11) of the Act. As the record supports a finding of Browning's supervisory status based, in part, on his ability to effectively recommend the hiring of employees and to responsibly assign work and direct the workforce, I find Browning is a statutory supervisor and, therefore, exclude him from the Unit.

Contrary to the Petitioner, the Employer also argued during the hearing that Leslie Pritchett is a confidential employee and should be excluded from the Unit. However, in its brief, the Employer withdrew its assertion of Pritchett's confidential status. As there is insufficient evidence to make a finding of confidential

Based on the following facts and legal analysis as well as the record as a whole, I find, in agreement with the Employer, that Hovey and Arnold are statutory supervisors within the meaning of Section 2(11) of the Act, as they possess the authority to assign work and responsibly direct the workforce. Accordingly, I am excluding Hovey and Arnold from the Unit. However, as the record reveals insufficient evidence establishing that Boynton is a statutory supervisor, I am including her in the Unit.

Below, I have set forth a section setting forth the facts, as revealed by the record in this matter, and relating to background information about the Employer's operations and relating to the duties and responsibilities of the three alleged supervisors. Following the Fact section is a section dealing with my analysis of the applicable legal standards in this case and a section setting forth the direction of election.

1.) FACTS

A.) Background

The Employer's Facility is broken down into three general departments: Customer Service, Data Services, and Technical Operations.

The Customer Service Department, supervised by Team Lead Rod Kirk, assists customers by answering any questions they may have about the Employer's services.

The second department, Data Services, provides high-speed broadband service (Instanet) to customers and is overseen by vice-president/CIO Byron Cotton and managed by Ray Spreier. Data Services includes Help Desk/Tech Support, "Enterprise", "MIS", Sales and Operations.⁵ Help Desk/Tech Support (HD) assists cable modem customers by phone, email, or by traveling to the customer's location. Specifically, HD employees provide extended customer help in the event that the Customer Service Department is not able to resolve a customer's issue. Cindy Hovey is the HD lead and reports directly to Spreier. Three other employees also work in HD and report to Hovey. Enterprise is comprised of three employees, including Kathy Boynton, who report to Spreier. The record does not provide details regarding the work performed in Enterprise other than it involves the Employer's website.

Dan Heller is in charge of the third department, Technical Operations, which consists of Installation, Maintenance, Headend, Construction, and Special Projects. Craig Paoli is the Technical Operation's Manager over Installation, Maintenance, and Headend. Jeff Liberty is the Technical Operation's Construction Manager and directly supervises the construction lead, Tom Arnold. The Construction division also includes a Fiber Specialist, two Construction Tech IIs, an Advanced Constructor, and a Constructor, all of whom report to Arnold. Steve Zettle is the Special Projects Manager who oversees the Design/Drafting, Rebuild, and Inventory Divisions.

status, I conclude that Pritchett has not been shown to be a confidential employee and, thus, is included in the Unit.

⁵ The MIS, Sales and Operations Departments are not relevant to the instant proceedings and are, therefore, not discussed.

B.) Supervisors' Duties and Responsibilities

1.) Cindy Hovey

The record presents no evidence that Hovey transfers, suspends, lays off, recalls, promotes, discharges, rewards, or adjusts employee grievances or has the authority to effectively recommend such actions. Instead, the Employer and the record evidence focuses on Hovey's contended authority to do following: (1) hire, (2) assign work, (3) discipline employees, and (4) responsibly direct the workforce, or effectively recommend any such actions.⁶ In addition, Hovey arguably possesses several secondary indicia of supervisory authority, most notably her involvement in the Employer's certification process, the employee training program, and in employee evaluations, and her attendance at supervisory training sessions. Contrary to the Employer, the Petitioner argues that Hovey possesses none of the statutory indicia set forth in Section 2(11) of the Act.

Hovey was promoted to the newly created HD lead position in October 2002 after working as a HD employee and as a Customer Service employee for approximately 4 ½ years. The lead position was created by Spreier, the Data Services Manager, approximately a month after Kathy Boynton left her supervisory position in HD and moved to Web Development, a sub-division of Enterprise. Although Hovey was not given a job description when she was promoted, Spreier informed Hovey that she would have supervisory responsibility over HD, which consists of employees Josh Richesin, Dave Kahwajy, and Erik Johnson.

With regard to the first alleged supervisory indicia, it is undisputed that Hovey does not have authority to hire employees on her own. Rather, Hovey's involvement in hiring is restricted to a limited role in the application process, the interviews, and the hiring decisions.

Regarding the application process, Hovey is involved in selecting applicants and creating tests for the applicants. Although Hovey helps Spreier select applicants from a pool, it is unclear if Hovey actually limits the applicant pool or if she merely comments on the applicant's capability. Hovey also helped to create a technical scenario test given to HD applicants. Hovey and the other three HD employees developed skills questions for the candidates and then Hovey arranged the questions in a document. The record does not indicate when Hovey compiled this test. While a lead, Hovey created a short skills assessment test that has been used twice to test computer skills for installer applicants in the Technical Operations department.

With respect to interviews, the record indicates that Hovey plays a role in the interview process. Hovey, along with Spreier and Boynton, was present during the interviews of two HD applicants. The record reveals that Hovey's participation in the interview process was for the purpose of providing her an opportunity to offer her opinion whether the interviewed individuals were good matches for HD. Although Hovey testified she asked questions during the interview, it is unclear exactly to what extent she participated in the interviews.

In connection with hiring decisions, Hovey testified that after the interviews, she offered her opinion to Spreier as to whether the candidates were a good fit with HD. However, she further stated that Spreier made the final decision to hire HD employee Richesin. On the other hand, Spreier testified that although he maintains hiring authority, the decision to hire Richesin was a "collaborative" one in which he, Boynton, and Hovey agreed. He further explained that since Hovey has only been involved in one hiring determination, she has not had the opportunity to recommend a hiring decision that differed from his opinion. Spreier clarified that Hovey nevertheless has the

⁶ As all of the facts related to Hovey's responsible direction of employees are encompassed by the other primary and secondary indicia discussed in this section, a discussion of the facts regarding responsible direction will be reserved for the Analysis section below.

authority to make hiring recommendations and he “would respect” and “listen” to the recommendations. Despite this, it is unclear as to whether Spreier would actually accept and act on such recommendations.

The second statutory indicium attributed to Hovey is her ability to assign work to HD employees. Specifically, Hovey developed a master weekly schedule of the five assigned duties, in addition to the Daily Coordinator duties described below, that must be completed each day by her and the three other HD employees. Such duties encompass the HD employees’ entire day. Further, Hovey’s weekly scheduling chart remains in effect week after week without changes unless, for example, an employee is absent from work. In that instance, Hovey makes sure that the remaining employees or herself take over for the unavailable employee. On the rare occurrence where all three HD employees are absent and Hovey is alone, she “reserves the right” to have Aaron Gilmore, who currently works in Enterprise Support but who used to work in HD, assist her. However, it is not clear whether Hovey has the absolute authority to require Gilmore to assist her or if she can just merely request his assistance. Regardless, it is clear that the decision that Gilmore’s assistance is needed, rests solely with Hovey.

The five daily duties in Hovey’s master weekly schedule are assigned in one, two, or four hour blocks of time and include (1) Tech 5000 duty when HD employees answer customer calls within a certain number of hours after Customer Service is not able to fully resolve the issue; (2) 780 Queue duty when the HD employees assist Customer Service by answering some of their customer calls directly; (3) 776 Queue duty when the HD employees answer questions from the Employer’s installers and the customer service representatives; (4) Supertech duty when the HD employees go into the field to resolve customer issues;⁷ and (5) Black Time duty when the HD employees work on individual projects not dealing with customer support such as participating in or preparing for training or working on a computer server.⁸ Hovey does not necessarily schedule or review such Black Time activities; rather each employee generally works on the projects without direction from Hovey. However, there are occasions where Hovey oversees Black Time activity. For example, each HD employee enumerated certain items, which they felt needed to be included on the Employer’s online help guide, which Hovey maintained. Since making the list, each employee independently decides which item they want to work on during their Black Time. Hovey, in turn, is responsible for ensuring that all the online help guide items are completed by the end of the month and for reviewing the work prior to putting it on the website.

In addition to the five duties described above, the master weekly schedule also assigns each HD employee, including Hovey, to act as a “Daily Coordinator” once a week. Gilmore also acts as a Daily Coordinator one day a week.⁹ The Daily Coordinator issues a report to the company twice a day reflecting the number of calls that came in during the current and previous day and reports on any rebuild issues.¹⁰

Hovey assigns the five daily duties and the block of times to the HD employees based on the skill of the employee and on what each employee enjoys doing. Hovey, Kahwajy and Johnson are Tech II employees meaning they have passed three or more Microsoft tests. Kahwajy is admittedly a more skilled employee than Hovey as he has a university degree, more experience and has passed a more difficult Microsoft exam. Richesin is a Tech I employee, having only passed one test.

⁷ In regards to the Supertech work, Hovey merely schedules a block of time for this work but each employee determines if he/she actually needs to go into the field to resolve a particular issue.

⁸ Although the record does not describe the projects or indicate who assigns these projects, the record does state that Hovey occasionally receives assignments from Spreier, which she assigns to one of the three HD employees. The record does not indicate the nature and extent of these assignments.

⁹ The record does not reveal the details of Gilmore’s position.

¹⁰ Rebuild is a department in which the employees replace old facilities with cable modem services.

Thus, Hovey, knowing the experience level of each employee, developed the weekly schedule and assignments.

In relation to the assignment of the duties to each employee, Hovey keeps daily track of the number of phone calls and emails received each day by the HD employees¹¹ and the number of supertech runs. She is also responsible for making sure the employees respond to the customers in a timely fashion. Hovey testified that she has the authority to grant customers credits up to a certain level if their service is interrupted due presumably in part to the failure of the employees' timely response to the customers' problems. The record did not reveal the maximum amount Hovey can credit to a customer. Notwithstanding her responsibility to ensure timely responses, Hovey testified, contrary to Spreier, that she has never been told that she can authorize overtime. Rather, Hovey stated that when employees need overtime, they go directly to Spreier. According to CIO Cotton, Hovey uses the information regarding the amount of work completed and the timeliness of such work to decide if the employees should be "told what a great job they did or that they're running a little bit behind."

Regarding the third alleged statutory indicia, Cotton testified that Hovey has the authority to issue verbal and written discipline. Conversely, Hovey testified that while she can issue verbal discipline, she is not sure she can issue written discipline, as the situation has not arisen. The record contains two instances of alleged discipline issued by Hovey. The first instance was in February 2003 after an employee's driver's license was suspended. Spreier asked Hovey how this situation might impact the scheduling of supertech work and asked her to send Spreier an e-mail reflecting their conversation. Later, after Hovey further discussed the situation with Cotton, it was decided that Hovey should issue a letter to the employee with a 30-day deadline to resolve his license issue or face possible termination. The record does not disclose who made the decision regarding the contents of the letter. The second instance occurred when Hovey was having difficulties with an employee who was not completing his work assignments. The employee was informed that he had to perform the duties as noted in Hovey's schedule.¹² There is no indication in the record that such counseling affected the employee's job status or that a disciplinary recommendation was made. However, Cotton testified that, in general, an employee's failure to complete such assigned duties may negatively impact that employee's yearly evaluation and related rate of pay.

As stated previously, in addition to the primary statutory indicia described above, Hovey possesses other secondary indicia of supervisory authority including monitoring the modem certification requirements for Technical Operations installers. Although the Employer does not require such certifications, they are tied to wage increases. In order to become certified, an installer is required to complete 25 modem installations without receiving any assistance from customer service or other installers. After Hovey ensures the installations are completed without assistance, she signs off on the work orders and she and Spreier sign a certification. If Hovey does not sign off on an installation, it does not count towards the certification. Even though Hovey is responsible for the certifications, the record reflects that Installation Lead Browning and Spreier decided to allow an exception to the certification process where certain employees could be certified after 10 installations rather than 25. According to Hovey, the decision was made without her input and against her objections. In short, the record does not disclose what independent judgment, if any is required of Hovey to determine whether an installer completed an installation without assistance.

¹¹ It is not clear whether this task is any different from the described duties of the Daily Coordinator.

¹² Spreier testified that he told the employee that he had to abide by Hovey's tasking. However, Hovey's testimony indicated that she, rather than Spreier, instructed the employee that she was in charge. Regardless, the fact remains, that HD employees are to abide by Hovey's directions.

Another possible indicator of secondary supervisory authority is Hovey's development of the Employer's training curriculum and her training of the customer service representatives, installers, and the service and maintenance technicians. In developing the curriculum for other departments, Hovey proposes the items, which she believes should be covered, to the department lead or manager. The departments typically accept their respective curricula. All of the HD employees also participate in training the installers by going with them to customer locations and assisting them with installations.

A third indicator of secondary supervisory authority is Hovey's involvement in the evaluation process. Hovey testified, without detail, that her job duties include assisting Spreier in evaluating employees. However, Hovey has not yet conducted any employee evaluations. Further, it is unclear exactly what impact Hovey's evaluations would have on an employee's employment as Spreier testified that he will also be doing his own independent evaluation of each employee.

A fourth secondary indicium of supervisory authority is Hovey's required attendance at supervisory training courses. She has taken courses dealing with grammar skills, negotiating, time management, how to deal with employees, the hiring process and discipline, and will be taking courses dealing with effective presentations, scheduling meetings, and interpersonal communications. Despite this, it does not appear that Hovey attends any supervisory or management meetings. However, the leads, including Hovey, rotate the responsibility of holding the Data Services departmental employee meetings.¹³ The record does not reflect what occurs in the meetings.

Lastly, there are five other secondary indicators related to supervisory authority, which should be noted. First, as a result of varying skill and educational levels, Kahwajy earns \$15.65 per hour, while Hovey earns \$14.45 per hour¹⁴. Johnson earns \$12 per hour and Richesin, \$10.56.¹⁵ Second, Hovey and the other three HD employees are eligible for a bonus equal to five days of wages while at least some of the higher level supervisors and managers, including Spreier, are eligible for bonuses of up to 10% of their annual salary. Third, all employees, supervisors, and managers receive the same benefits package. Fourth, all four HD individuals serve as junior on-call employees on weekends or after business hours to address customer's questions. When they are not able to resolve a customer's issue, they call the senior on-calls: Spreier, Koetting, Boynton or Cotton. Fifth, Hovey has the authority to allow employees to leave work early but it is not clear what is the nature and extent of this authority and it is not clear under what circumstances the authority comes into play.

2.) Tom Arnold

The record reveals that Tom Arnold does not transfer, suspend, lay off, recall, promote, discharge, reward, or adjust employee grievances and does not have the authority to effectively recommend such actions. Rather, evidence of Arnold's possession of primary statutory indicia is limited to Arnold's controvertible authority to (1) hire, (2) assign work, (3) discipline employees, and

¹³ The Employer testified that the Data Services leads include Hovey, Leslie Pritchett (see FN 4), Kathy Boynton, Bart Koetting, and Rich Mangum. The parties stipulated that Koetting is to be included in the Unit and Mangum is excluded from the Unit. (See FN 22 and FN 24.)

¹⁴ When promoted, Hovey received a \$1 raise and received an additional 45-cent raise in December 2002 after passing another Microsoft test.

¹⁵ The following individuals are salaried: Paul Morton, Byron Cotton, Ray Spreier, Kelli Bach, Rod Kirk, Dan Heller, Craig Paoli, Jeff Liberty, and Steve Zettle.

(4) responsibly direct the work force, or to effectively recommend such actions.¹⁶ In addition, the record indicates that Arnold arguably possesses several secondary indicia of supervisory authority, including among other items, negotiating contracts with outside contractors, participating in evaluations, approving issues involving hours of work, overseeing safety meetings and emergency situations, assisting in the development of the Employer's performance criteria matrix, and attending supervisory meetings. Contrary to the Employer, the Petitioner contends that Arnold does not possess any of the statutory authority defined by Section 2(11) of the Act.

Arnold, who has 30 years experience in the construction industry, has worked for the Employer for four years and as its construction lead since August 22, 2002. The Construction division consists of Liberty, Arnold, and five additional employees. The five employees (Dwayne Dunaway, Todd Reid, Matt Pearson, Jonathon Ruel, and Raymond Frank) report to Arnold, who in turn reports to Liberty. Construction is responsible for building underground and aerial cable plants and activating the facilities for new developments.

Arnold is generally in the office for about two to four hours each morning and in the field four to six hours per day. Arnold testified that approximately one third of his time is spent doing construction work or approving conduit burial work. Presumably the rest of his time is spent on the activities described below.

First, regarding Arnold's role in hiring employees, it is clear Arnold cannot, in fact, hire workers on his own. Rather, he "would be involved in the interviews" and later recommend whether the Employer should consider hiring the applicants. However, the record does not indicate what effect the recommendation would have on the Employer's hiring decision as no hiring has taken place since Arnold became lead.

Second, the record reveals that Arnold assigns work to the five employees in Construction. Arnold typically receives work orders from various sources including the Installation Department, Dispatch, Customer Service, manager Liberty, or outside contractors. After receiving the orders, Arnold assigns the work to the five employees in Construction. The work orders, which Arnold receives from the Installation Department at times, requests him to provide assistance to that Department. In such cases, Arnold assigns his employees to temporarily work in Installation. Regarding outside contractor work orders, Arnold directly communicates with the contractors who occasionally need him to place underground conduit structures in new housing developments. Accordingly, Arnold rearranges the employees' work schedules and assigns the work in order to comply with the outside contractors' demands. Arnold also directs his employees to repair work that the contractors have done incorrectly. Furthermore, after receiving work orders, Arnold has the authority to change the design if necessary, assign the work, and thereafter inform the Engineering/Design Department of the change. The other employees may not make such changes without Arnold's approval.

Although Arnold usually receives work orders from various sources and then assigns employees to do the work, there are exceptions where some employees receive their work directly from other individuals. For example, employee Frank usually receives his assignments directly from dispatch or the Technical Operations technical assistant. Nevertheless, either Arnold, Liberty, or maintenance supervisor Williams must first approve that assignment. Also, Ruel's work time is usually spent completing "locate" orders, which he receives directly from Dispatch. Such orders instruct Ruel to locate underground facilities prior to digging. However, Arnold at times also assigns other type of general construction work to Ruel. Similarly, Dunaway is scheduled to work in the

¹⁶ As all of the facts related to Arnold's responsible direction of the workforce are encompassed by the other primary and secondary indicia discussed in this section, a discussion of the facts regarding responsible direction will be reserved for the Analysis section below.

Rebuild division two days a week. During that time, he receives assignments from that division instead of from Arnold.

Arnold's task of assigning work requires him to prioritize the work orders that he receives and, then, to assign the work based on the type of work requested, the completion date, and the varying skills of the employees. The type of work that Arnold assigns includes activations, new installations, business connections, and new areas of hook-ups. Typically, the work orders request a two-week completion date, which Arnold attempts to enforce. However, if the deadline cannot be met, Arnold reschedules the work. With respect to prioritizing work based on varying skills and experience, the record reveals that each of the five Construction employees differs in the nature and extent of skills they possess. Dunaway, the fiber specialist, is the most skilled employee who can do any type of work, but normally splices fiber optics and activates business connections. The next most skilled employees are Reid and Pearson, construction technician IIs, who can do almost any work other than splicing fiber. Specifically, they do the aerial work, activate amplifiers, which boost the signal, tap locations,¹⁷ and pull cable. The next employee in skill level is Ruel, who is an advanced constructor who assists aerial construction, pulls cable, splices taps and occasionally buries facilities. However, as stated previously, Ruel's time is mostly spent locating facilities. Finally, the newest employee, constructor Frank, helps bury conduit, pulls cable, pulls trailers, sets pedestals and locates. He is not allowed to do aerial work. In short, Arnold accounts for all these variables when prioritizing and assigning work.

After assigning the work, Arnold visits the work sites about two to three times per week to inspect the employees' work to ensure timely and precise completion, to provide all necessary materials, to instruct employees as to their tasks, to assist with the work, and to respond to any problems the workers may have. While inspecting the employees' work, Arnold completes quality control forms and later reviews the forms with employees during group meetings. Further, as Arnold is responsible for making sure the assigned work is completed on time and performed correctly, Arnold keeps track of employee productivity using 15-minute increments. If an employee is not productive, Arnold discusses the situation with the employee. Moreover, if any employee refuses to perform certain work, Arnold can compel the employee to complete the work. Additionally, in order to ensure that all relevant materials are provided, Arnold has the authority to purchase such materials up to a certain amount, although such amount was not stated in the record. For materials over that dollar amount, Arnold must get prior approval from Liberty. Nevertheless, Arnold testifies that Liberty always approves his requests.

The third statutory indicium arguably attributable to Arnold is his involvement in disciplinary matters. Evidently, Arnold does not have the authority to issue discipline on his own. Rather, Arnold is responsible for merely informing Liberty of "situations that are occurring and possibly mak[ing] recommendations." Arnold has not yet made any such recommendations.

The record reveals that Arnold is involved in six additional functions. The Employer contends Arnold's involvement in these functions establish secondary indicia of Arnold's supervisory authority. Those six functions are set forth below.

First, Arnold spends time contracting with outside contractors to install underground conduit and facilities if his employees do not have the time to do the work. If Liberty is present, Arnold must have him approve the contracted work, although Liberty has always accepted Arnold's recommendation. If Liberty is not available, Arnold has the authority to contract the work. In addition, Arnold coordinates with utility companies to relocate facilities to new locations. It is not clear what the financial impact is to the Employer when Arnold approves contracted work and how frequently these approvals occur.

¹⁷ Taps are connection devises placed outside of homes.

Second, Arnold is responsible for participating in evaluations, which are tied to merit increases. Arnold, however, has not yet completed any evaluations. While Dunaway was evaluated in February 2002 after Arnold became lead, Liberty testified that he conducted the evaluation, as he did not feel Arnold was ready to do the evaluation. Liberty further testified that once Arnold completes an evaluation, Liberty will review it. The record does not indicate if Arnold will make any recommendations in the evaluations, what effect such recommendations would have on an employee's employment status, or if Liberty's review would trump Arnold's evaluation or possible recommendations.

Third, the record reveals that Arnold has some involvement with employees' attendance, specifically, approving vacation requests, time off, overtime, and timesheets. Under the Employer's policy, vacation requests are generally only granted if submitted two weeks in advance and if there is only one other person scheduled on leave during that time. Liberty testified that, after he receives a request, he consults with Arnold to determine if anyone else is scheduled to be off during the same time period and if Arnold can spare the requesting employee. Liberty testified that Arnold can recommend denial of leave but the record is unclear as to what effect his recommendation had the one time this occurred. Arnold also has the authority to allow an employee to leave early or come in late and has acted on this authority. In addition, Liberty testified that Arnold has the authority to grant overtime and has done so on several occasions. In contrast, Arnold testified that he cannot grant overtime without Liberty's approval. Finally, Arnold testified that he is responsible for reviewing time cards and has his employees make changes if they are incorrect. He also stated that he signs the time cards when Liberty is out of the office. This has occurred approximately two times.

Fourth, Arnold is responsible for the weekly employee safety meetings and emergency situations. Arnold typically does not attend the meetings; rather, he assigns the task to an employee. The named employee chooses the topic, holds the meeting and has employees sign a sheet indicating they attended the meeting. After the conclusion of the meeting, the employee submits the sign-in sheet to Arnold and notifies him of the topic covered at the meeting. Arnold is also responsible for responding to emergency situations, securing the scene, contacting emergency facilities if needed, and completing an accident report. Arnold, in contrast to Liberty, testified that he has never been told that he is responsible for having employees drug-screened after accidents (emergency situations) and has never done so.

A fifth function performed by Arnold relates to the Employers mid-point matrix system. This system is used to determine where an employee should be in his/her career and what wages he/she should be earning. Liberty developed the matrix for the Engineering Department while Arnold assisted in creating the mid-point performance criteria matrix for Construction by compiling information regarding job complexity, job skills, productivity levels, quality, and certifications needed for each construction classification. Arnold gathered the information from job descriptions and production reports.¹⁸ The construction employees did not have input into the matrix and do not have access to it.

A sixth function relates to Arnold's contested attendance at supervisory meetings. Liberty testified that Arnold attends Technical Operations meetings with Browning, Zettle, Paoli, Williams, Hoffman, Feist, and Liberty in order to report information to the group on the status of construction projects. Arnold disputed this testimony although he conceded attending one meeting with Heller, Liberty, and possibly Browning. It is not clear what was the purpose of that one meeting.

As a final point, the record discloses five additional but limited items related to secondary indicia of supervisory authority, which were disclosed in the record. First, Arnold earns \$17.84 per

¹⁸ It is unclear whether the job description and production reports are confidential materials.

hour, which is \$2.41 over the next highest paid constructor, Reid.¹⁹ Second, Liberty, rather than Arnold, determines employee bonuses. Third, Arnold shares an office, where he has a desk and computer, with installation lead Browning and maintenance supervisor Alan Williams. The other employees do not spend time in the office. Arnold testifies that he only uses the computer for accessing maps and for company email. Ruel, who uses a laptop to access maps of underground facilities, is the only other construction employee with a computer. Fourth, Arnold, Reid, and Pearson are senior on-call personnel, Dunaway is a junior on-call, and Paoli, Zettle, Williams and Liberty act as on-call supervisors/managers. Fifth, Arnold, as well as the other five construction employees, wear company uniforms.²⁰

2.) Kathy Boynton

The record indicates that Boynton works alone in Enterprise/Web Development as a web editor and designer. There is no other evidence as to Boynton's duties and there is no evidence that Boynton has the authority to transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, responsibly direct, or adjust employee grievances, or effectively recommend such actions. Rather, the record is limited to Boynton's role in hiring decisions. As with Hovey, Boynton has sat in on interviews with Spreier. Similarly, Spreier testified he would listen and respect Boynton's dissenting view regarding an applicant but that situation has never presented itself. Thus, it is not clear what effect Boynton's recommendations have on hiring determinations.

2.) ANALYSIS

Based on the foregoing and the entire record, I find that Cindy Hovey and Tom Arnold are supervisors within the meaning of Section 2(11) of the Act and, therefore, are excluded from the Unit. I do so on the basis that they independently, while exercising significant judgment, assign work and responsibly direct the workforce. However, I find that Kathy Boynton does not possess indicia of supervisory authority as that term is defined by Section 2(11) of the Act.

The term "supervisor" is defined in Section 2(11) of the Act as follows:

[A]uthority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia establishes supervisory status as long as the performance of the function is not routine or clerical in nature but rather requires a significant degree of independent judgment. *Stephens Produce Co., Inc.* 214 NLRB 131 (1974); *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). "A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act." *Hicks Oil & Hickgas, Inc.*, 293 NLRB 84 (1989); *Kentucky River Community Care, supra at 1866 - 67.* "The Board has a duty to employees to be alert not to construe supervisory status too broadly

¹⁹ The remaining employees' approximate wages are as follows: Dwayne Dunaway - \$14.33, Matt Pearson - \$13.40, Johnathon Ruel - \$11.50, Raymond Frank - \$11.00.

²⁰ The record reveals that certain other employees also wear uniforms.

because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” *Hydro Conduit Corp.*, 254 NLRB 433 (1981). However, persons, who have authority to assign work, move employees from one task to another, and grant leave requests, have been held to be supervisors under the Act. *Louisiana Gas Service Co.*, 303 NLRB 908 (1991); *Massachusetts Coastal Seafoods, Inc.*, 293 NLRB 496 (1989). See also *Sunnyside Home Care Project*, 308 NLRB 346 (1992).

The Supreme Court in *Kentucky River* emphasized that the degree, not the kind, of independent judgment is critical with respect to a finding of supervisory status. Put another way, the judgments made by an individual must be of a level of difficulty exceeding that which is merely routine or clerical in nature. However, the complexity of a given task is deemed equally complex, or not, regardless of the identity of the performer. A judgment that would be complex for, say, a high school graduate, does not become routine or clerical when performed by a Ph.D. Complexity is evaluated on an absolute scale (presumably based on an “ordinary” person), not a scale that varies according to the training, schooling, or experience of the individual judgment maker. See *Phillips Industries, Inc.*, 295 NLRB 717, 735 (1989). Moreover, independent judgment occurs when a supervisor makes decisions independent of consultation with higher management. *Id.*

The record indicates that through the use of their independent judgment, Hovey and Arnold assign work to their employees. Although some of the employees supervised by Hovey or Arnold may be able to do some or most of the various tasks needed, each employee varies in the degree of skill and competency they individually possess. There is no indication that most of the assignments are based on a particular certification or qualification. Rather, in determining which employee will be assigned a particular task, Hovey analyzes the skills each employee has and then assigns duties to each employee. When an employee is absent, Hovey reassigns work and/or recruits a worker from a different department to assist her. Likewise, Arnold takes into account the specific abilities of the employees, the job at hand, and the priorities of the varying assignments. Arnold also reassigns work as needed based on his reprioritization of projects. Further, there is no evidence that either Hovey’s or Arnold’s independent judgment is constrained by detailed orders or regulations. *Kentucky River* citing *Chevron Shipping Co.*, 317 NLRB 379 (1995). For example, although Arnold works off of a blueprint, he may make changes to the design on his own authority. Hovey also determines the tasks to be completed in her department and by whom without consulting any superior.

While the record clearly establishes that Arnold assigns work to five Construction Department employees on a regular and frequent basis, the record appears to show that Hovey’s daily assignments are covered by a master work assignment schedule that employees can readily refer to for determining their work assignments. Hovey designed and implemented this master work assignment schedule shortly after assuming her position as HD lead. However, whether the authority to assign work is exercised on one occasion to create and implement a master work assignment schedule or operated on a daily basis as in Arnold’s situation, such appears legally irrelevant under the circumstances of this case because the Board has held that a person is a supervisor if he or she has any of the authority described in the statute whether that authority is actually exercised. *Redi-Serve Foods*, 226 NLRB 636, 637 (1976); *Anaheim Town & Country Inn*, 282 NLRB 224, 233 (1986). In the instant matter, the record reveals that Hovey has been, at all time relevant herein, responsible for assigning work to four individuals, including herself, and, on occasion, to a fifth employee. Hovey, apparently on her own initiative, chose to create and implement a master work assignment schedule which she has had to adjust when employees are absent, when the workload requires the assistance of a fifth person, or when additional assignments arise. It also appears reasonable to assume that if new employees were to replace a current employee, Hovey would be responsible for adjusting her master work assignment schedule to account for the new employee’s skills and/or experience in relation to the work performed by Hovey and the others.

In light of the above and the record as a whole, I find that Hovey and Arnold possess the authority to assign employees work and that they exercise independent judgment in that regard.

The record further establishes that Hovey and Arnold responsibly direct their employees within the meaning of Section 2(11) of the Act. In *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4th Cir. 1981), cited with approval by the Board in *DST Industries*, 310 NLRB 957 (1993), the court found five foremen to be statutory supervisors based on their responsible direction of other employees despite the fact that the daily operation was to some extent governed by written procedures and guidelines. In coming to this conclusion, the court defined responsibility as being “answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and is implied by power.” *Id.* at 613. In that case, the court found that the alleged supervisors were responsible for coordinating the activities of employees, analyzed and resolved machinery problems, put employees to work when needed, and resolved difficulties if higher level supervisors were unavailable. The Court reasoned that if an employee “must coordinate the activities of several other employees to ensure the smooth operation of delicate machinery, [the employee] necessarily exercises a significant degree of independent judgment.” *Id.* at 614.

In the case at hand, Hovey and Arnold are “answerable for the discharge of a duty or obligation, and use their skills, abilities and experience in directing the workforce.” In particular, Hovey and Arnold are in charge of their respective operations and are responsible for reviewing and ensuring the timely completion of the work they assign their employees. There is no showing that they are in regular contact with their superiors in determining how to direct their employees. Both Hovey and Arnold counsel their respective employees regarding performance issues. Although such consultation does not rise to the level of the statutory indicium of discipline, the fact that the supervisors directly address such concerns enhances the finding of “responsible direction.” Further, Hovey trains the cable modem installers and is in charge of installers’ certifications, which are tied to wage increases. Arnold has the authority to allow his employees to arrive late or leave early. He also reviews the employees’ time cards, directs them to make corrections if needed, and is in charge of emergency situations involving his employees. Arnold also assisted in creating company policy by compiling criteria outlining where an employee should be in his career with the Employer.

Moreover, as in *Monongahela Power*, both Hovey and Arnold coordinate the performance of their workers with the rest of the company. For instance, if Hovey determines that help is needed from a different department, she has the authority to obtain such help. Further, Hovey must make sure that she has assigned all the duties correctly so that her employees are effectively assisting customers, the Customer Service Department, and the Installation Department. Likewise, Arnold coordinates projects between his department and the Engineering/Design Department and assigns his employees to assist the Installation Department. Arnold also coordinates the work of his employees with that of outside contractors. In summary, Hovey and Arnold inspect, review, and correct their employees’ work, direct their activities, and respond to employee issues dealing with the performance of work under their respective charges. Based on the above, I find that Hovey and Arnold responsibly direct employees within the meaning of Section 2(11) of the Act.

In contrast to the above, the record evidence does not support a finding that Boynton, Hovey, or Arnold hire employees or effectively recommend such action. The burden of proving supervisory status lies with the party asserting that a named individual is a statutory supervisor. *Kentucky River*, 121 S. Ct. at 1866-1867. The Employer has not met its burden regarding this statutory indicium related to hiring. The Employer concedes that none of the three disputed individuals has the sole authority to hire employees; however, it asserts all three can effectively recommend such actions. Contrary to the Employer’s assertion, the record reveals that although the three individuals may be able to voice their opinions, it is not clear what role such opinions actually play in the hiring decision. As in the case of Hovey and Boynton, since Spreier has always reached a consensus with them regarding hiring decisions, it is unclear what impact their opinions had on the final decisions.

Further, it is unclear exactly how Hovey and Boynton's dissenting opinions would contribute to the decisions. Moreover, Hovey's mere recommendation as to whether a prospective employee would be compatible in her department is "insufficient to support a finding of hiring authority within the meaning of Section 2(11)." *Tree-Free Fiber Co.*, 328 NLRB 389, 391 (1999). As for Arnold, he has never made a recommendation. Thus, there is no basis to determine the effectiveness of a recommendation by Arnold. In brief, the Employer has failed to demonstrate that any such hiring recommendations, by Hovey, Arnold and/or Boynton, are effective as contemplated by Section 2(11) of the Act. *Third Coast Emergency Physicians*, 330 NLRB 756 (2000).

Similarly, there is insufficient evidence to show that Hovey or Arnold discipline employees or effectively recommend such discipline. Although the Employer asserts Hovey has the authority to issue verbal or written warnings, there is insufficient evidence that the warnings have any effect on an employee's employment status. Thus, such warnings do not establish supervisory authority. *Azuza Ranch Market*, 321 NLRB 811, 812-813 (1996). Further, if the warnings merely relay performance issues without any recommendation for actual discipline, such warnings fail to establish supervisory authority. *Williamette Industries, Inc.*, 336 NLRB No. 59 (2001); *Illinois Veterans Home at Anna*, 323 NLRB 890 (1997). There is also no evidence that Hovey or Arnold can effectively recommend discipline. Although the record reveals that Hovey was involved in one "disciplinary" action in which an employee was issued a deadline to resolve certain issues, it is not clear what role Hovey had in making the decision. In view of the above and the record as a whole, I find that record discloses insufficient evidence to establish that Hovey or Arnold possess the authority to discipline employees or to effectively recommend such action.

Lastly, the task of evaluating employees is not an enumerated supervisory function under Section 2(11) of the Act. "Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor." *Franklin Hospital Medical Center*, 337 NLRB No. 132, 12 (2002). Accordingly, although Hovey and Arnold may participate in employee evaluations, under the circumstances of this case, such participation does not indicate supervisory authority. Specifically, the record does not indicate whether Hovey or Arnold would make any recommendations regarding personnel decisions. Further, as their superiors review the evaluations or conduct their own evaluation of the employee at issue, it is not clear what impact, if any, Hovey and Arnold's evaluations would have on the employees' tenure or wages. Thus, Hovey and Arnold's mere participation in the evaluation process is insufficient to establish a supervisory finding. *Harborside Healthcare Inc.*, 330 NLRB 1334 (2000).

In conclusion, having considered all the evidence related to Hovey and Arnold, I find they are statutory supervisors based on their authority to assign work and to responsibly direct employees while utilizing independent judgment. Accordingly, I shall exclude Hovey and Arnold from the unit. However, I find Boynton is not a statutory supervisor as she does not possess any of the statutory indicia required by Section 2(11) of the Act. Consequently, I shall include Boynton in the unit.²¹

On the basis of the foregoing and the record as a whole, I shall direct that an immediate election be held in the following appropriate unit²²:

All full-time and regular part-time hourly employees, employed by the Employer at its Bend, Oregon, facility, performing work in the following departments.²³ Technical

²¹ The parties stipulated to the inclusion in the unit of all employees working in the Instanet Department, which would include Boynton who works in that Department.

²² The Unit description is in substantial accordance with the stipulations arrived at by the parties at the hearing. Such stipulations are described *infra*.

²³ At the hearing, the parties entered into a stipulation, which I accept, that the following employees are to be included in the Unit: Bill Fiest, Grant McLuskie, Harvey Marshall, Keith Redwine, Larry Johnson, Mark Kaupp,

Operations (including but not limited to the following classifications: fiber specialist, construction technician II, advanced constructor, advanced engineering/assistant HE technician, assistant technician, service technician, CLI/leakage, scheduler, cable modem installer, cable installer, and installer technicians²⁴), Customer Service, and Instantnet; but excluding all solely commissioned employees,²⁵ confidential employees,²⁶ guards, and supervisors,²⁷ as defined by the Act.

There are approximately 65 employees in the unit.

3.) DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Communication Workers of America, AFL-CIO.

A.) List of Voters

Alissa DeVoney, Jill Sheedy, Bart Koetting, Jeanee Poole, Bill Pierce, Erik Johnson, David Kahwajy, Josh Richesin, Aaron Gilmore, and Stephanie Farwell. This stipulation, however, does not limit other non-named qualifying employees from being appropriately included in the Unit.

²⁴ The parties stipulated at the hearing that the named classifications should be included in the Unit. As such, I have included the classifications in the unit description.

²⁵ At the hearing, the parties stipulated that Rich Magnum should be excluded from the Unit, as he does not share a community of interest with other unit employees due to his status as a solely commissioned salesperson. In view of such stipulation, I am excluding Magnum from the Unit.

²⁶ At the hearing, the parties stipulated that Krista Zoeller is a confidential employee as she will be involved in negotiations regarding labor relations matters. As such, I am excluding her from the Unit. The parties further stipulated that Ladella Pardo is also a confidential employee. However, as no factual basis was provided supporting this later stipulation, I decline to accept such stipulation. Thus, I will permit Ladella Pardo to vote subject to challenge.

²⁷ At the hearing the parties stipulated that the following individuals are statutory supervisors as defined in Section 2(11) of the Act as they possess the authority to either hire, fire, discipline, reprimand, layoff, recall, or reward employees: Paul Morton (President), Byron Cotton (Vice President, Chief Information Officer), Ray Spreier (Data Services Manager), Kelli Bach (Director of Customer Service and Human Resources), Kate McPhillips (Marketing Manager), John Farwell (Financial Manager), Dan Heller (Director of Technical Operations), Jeff Liberty (Construction Manager), Steve Zettle (Special Projects Manager), Craig Paoli (Technical Operations Manager), Alan Williams (Maintenance Supervisor), Ray Hoffman (Headend Supervisor), and Rod Kirk (Team Lead). Accordingly, these individuals are excluded from the Unit.

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for SubRegion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The SubRegion shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the SubRegional Office, 601 SW Second Ave., Suite 1910, Portland, OR 97204-3170, on or before May 29, 2003. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B.) Notice of Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C.) Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 5, 2003.

DATED at Seattle, Washington, this 22nd day of May 2003.

Catherine M. Roth, Acting Regional Director
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177-8520-0800
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